**Published in:**

**The Jurnal of Comparative Law**

**Volume XII, Issue One**

**ISSN:**1477-0814

**Latest Release:**June 26, 2018

**Publisher:**Wildy, Simmonds and Hill Publishing

**Country of Publication:**UK

**pp.** 61-82

**In Search for Truth at Mass Atrocities Trials:**

**Will Judges and Lawyers Have the Last Word?**

Nevenka Tromp\*

Mass atrocities trials[[1]](#footnote-1) are like no other trials. They are held, just as any other criminal trial, to deliver justice to victims, to punish perpetrators, to mete out punishment and, by doing so, to deter - or rather, to control - the commission of crimes in societies. But, unlike domestic criminal trials, mass atrocities trials have been invested with expectations greater than administering justice and delivering judgments. They are supposed to have an extralegal purpose: to establish the truth about a conflict, to create a historical record, to contribute to the creation of a historical narrative, and to help in the shaping of collective memory.

In the past two decades doctrinal literature on the legal and extralegal purposes of mass atrocities trials has grown rapidly, proportionate to the number of international criminal courts that came into existence after the end of the Cold War.[[2]](#footnote-2) These courts - *ad hoc* and permanent - have processed over a hundred trials, many of which concluded with a judgment, whereas some have remained unfinished, mostly because defendants died before the end of the trial.[[3]](#footnote-3) Most judgments were convictions, and some were acquittals.

This article addresses the interplay between legal and extralegal purposes of mass atrocities trials by using a sample of the trials of political and military leaders held at the International Criminal Tribunal for Former Yugoslavia (ICTY).[[4]](#footnote-4)

The point of departure is the assumption that a courtroom always becomes the place of importance for establishing the truth, for producing a historical record, and for contributing to the historical narrative of the conflict. But what kind of truth, what kind of historical record, and what kind of historical narrative can be expected?

In order to answer these questions the following sub-questions are addressed: (1) what is the difference between “trial truth” and “real truth”; (2) what constitutes a trial record; (3) what sort of contribution to the historical narrative and collective memory can one expect from judgments – convictions, judgments on pleas of guilty or acquittals; (4) can an unfinished mass atrocities trial – without a judgment rendered – be a valuable historical source that contributes to the historical narrative?

This article first explores the debate among practitioners at the international criminal courts, legal scholars, victim communities, and post-conflict political elites on the interplay between the legal and extralegal objectives of mass atrocities trials. Then we turn to what sort of truth, historical record, and historical narrative a mass atrocities trial can produce. The next section examines the limitations that legal form can create in relation to historical narrative because of prosecutorial discretion about whom to indict for which crimes and according to which principles of responsibility. The limitations that rules of admissibility of evidence can have on the historical narrative when some evidence of importance is excluded or obscured from public view on a legal basis are considered. The final section discusses whether there is any value left, other than legal, for an unfinished trial. How might the trial archive of the unfinished trial contribute to historical justice and to the historical narrative?

DOCTRINAL DEBATE ON LEGAL AND EXTRALEGAL PURPOSES

OF MASS ATROCITIES TRIALS

The debate about the purpose of mass atrocities trials extends to the Nuremberg and the Tokyo Tribunals[[5]](#footnote-5) and has been dominated by two opposing views. [[6]](#footnote-6) The tone in the discussion on the purpose of a mass atrocities trial was set by Hannah Arendt (1906-1975), who argued that mass atrocities trials should fulfill their legal mandate and nothing else.

Reporting in 1961 from Jerusalem on the Eichmann trial, Arendt wrote “that the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes … can only distract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment”.[[7]](#footnote-7) Decades later when writing about the Tokyo Tribunal, Ian Buruma went a step further by arguing that there is no place for history in the courtroom: “Just as belief belongs in church, surely history belongs in school”. He concluded that “when the court of law is used for history lessons, then the risk of show trials cannot be far off”.[[8]](#footnote-8) A practitoner at the international criminal tribunals has more recently argued that historical record “can only be a by-product of the trials where the emphasis must necessarily be in determining whether the Prosecution has established the guilt of the accused beyond reasonable doubt”.[[9]](#footnote-9)

Their views stood in sharp contrast to the words uttered by Hartley Shawcross (1902-2003), the British Chief Prosecutor at the Nuremberg Tribunal who stated: “[W]e believe that this Tribunal ... will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning”.[[10]](#footnote-10)

A growing consensus is in evidence among scholars across different fields in accepting the complementarity between legal and extralegal purposes of mass atrocities trials. Lawrence Douglas has introduced the term “didactic legality”, arguing that trials of the Holocaust blurred the boundary between the legal and extralegal.[[11]](#footnote-11) While recognizing that the primary responsibility of a criminal trial is to resolve questions of guilt in a procedurally fair manner, Douglas advocates the integration of the legal and extralegal purposes of mass atrocities trials.[[12]](#footnote-12) Bilsky warns against compartmentalising the discussion into the legal versus the historical. In her view, this polarization distracts from the fact that a *transformative* trial should “fulfil an essential function in a democratic society by exposing the hegemonic narrative of identity to critical consideration.”[[13]](#footnote-13) Bilsky sees transformative trials as placed somewhere between the political and the legal.[[14]](#footnote-14) On one hand, she argues, a transformative trial has to remain loyal to the basic liberal values of the rule of law, and, on the other hand, it performs a unique function as a legal forum in which society’s fundamental values can be examined in the light of competing counter narratives as presented in the courtroom.[[15]](#footnote-15)

But what is the relationship between legal and historical truth; between legal and historical justice; and between legal and historical narrative? Does historical justice exist at all? Teitel lists five conceptions of justice: criminal justice, historical justice, reparatory

justice, administrative justice, and constitutional justice.[[16]](#footnote-16) She argues that the pursuit of historical truth is embedded in a framework of accountability and in the pursuit of justice, to which criminal trials contribute.[[17]](#footnote-17) In defining historical justice, Teitel applies the Enlightenment view, in which history is considered teacher and judge, and historical truth is equated with justice.[[18]](#footnote-18) Teitel cautions that when history takes its “interpretative turn”, there is no single, clear, and determinate understanding or lesson to draw from the past. Instead, one must recognize the degree to which historical understanding depends on political and social contingencies.[[19]](#footnote-19) Should we look for one single truth and one authoritative historical narrative about past abuses at all? Or is it realistic to expect that many versions of a troubled and complex past will always (co)exist with or without trial archives?

MASS ATROCITIES TRIALS, TRUTH, HISTORICAL RECORD, AND HISTORICAL NARRATIVE

**Limitations of Adversarial Legal Systems to Produce the Truth: “Trial Truth” vs “Real Truth”**

“What is the truth?” is a philosophical question. The fact that there are different kinds of truth – to start with a “historical truth” and “trial truth” – is confusing. Fergal Gaynor, a barrister with longstanding working experience at the international criminal courts, finds that the “extent to which a criminal trial is essentially a truth-finding exercise is on the philosophical fault-lines which divide the inquisitorial and adversarial systems”.[[20]](#footnote-20) The starting point for understanding the notion of “trial truth” is that a trial held under the adversarial legal regime produces at least two competing narratives – the prosecution narrative and the defence narrative – as to how a conflict turned violent and who was to blame. Generally speaking, the inquisitorial model (also known as European or civil law systems) seeks to come as close as possible to the truth, whereas the adversarial model (Anglo-Saxon legal systems) is more about following rules in presenting the evidence so as to preserve the fairness of the trial and ensure that convictions only follow proof by evidence and argument of allegations made.[[21]](#footnote-21)

The truth as produced at the trials presided over by Bert Röling (1906-1985), the Dutch judge at the Tokyo Tribunal, led him to conclude that the many rules adopted originally to protect the lay jury from misleading and untrustworthy evidence do not produce “real truth” but a “trial truth”.[[22]](#footnote-22) Modern day lawyers still voice the same concerns. Sir Geoffrey Nice, the lead prosecutor of Serbia’s President Slobodan Milošević at the ICTY, expressed his reservations about the adversarial model being the most efficient to prosecute mass atrocities. He explained how it can happen that judges compile judgments based on two opposing narratives - prosecution and defence - neither of which might be an accurate, or even a

truthful, interpretation of facts and events. Yet the judges may have little choice but to make their final determination based on the persuasivness of the evidence and legal arguments of one side and produce a judgment that will not tell the whole truth or the truth at all.[[23]](#footnote-23)

Otto Kirchheimer (1905-1965)[[24]](#footnote-24) advanced the theory of “double wager” for mass atrocities trials where polarized accounts of the past are presented by prosecution and defence.[[25]](#footnote-25) Kirchheimer’s theory was that even if a trial ends in a conviction, it may fail in its didactic aim because the narrative of the defendant might nevertheless prevail. This risk becomes greater when two or more persons are on trial for the same or similar crimes. [[26]](#footnote-26) Scholars who studied the prevailing narratives in the Holocaust trials found that the law succeeded at times but, at others, lost this wager.[[27]](#footnote-27)

**Courtroom History**

How did the “double wager” work at the ICTY? The ICTY’s indictments and trials show that the majority of those indicted were Serb nationals. This was the outcome of the investigation of the crimes that were committed during the wars in Croatia (1991-1992 and 1995), Bosnia and Herzegovina (1992-1995), and Kosovo (1998-1999). The majority of the victims in those wars were non-Serbs who lived within the Serb designated territories - the term used by the ICTY Prosecution to denote the aspiration by Serb leadership to create a post-Yugoslav Serb ethnic State. Two of the Serbs indicted, Radovan Karadžić and Slobodan Milošević (1941-2006), were the highest-ranking politicians ever indicted by the ICTY.[[28]](#footnote-28) It is noteworthy that before the ICTY was formed in May 1993, the majority of analysts, historians, and diplomats had singled out the Serb side as most responsible for the start of the war and the commission of crimes. But, there was also a counter narrative that saw Serbia and the Serbs as the victims of the conspiracy led by the international community and the former Yugoslav republics – Slovenia and Croatia – to destroy Yugoslavia as a State. The same competing narratives were repeated in the courtroom: the first by the prosecution and the latter by the defense.

The trial of Milošević was broadcast daily in the region. Milošević, who also defended himself in the court, understood the importance of his courtroom time and was busy addressing his home audience by showing contempt and haughtiness towards the judges, prosecutors, and occasionally towards prosecution witnesses.[[29]](#footnote-29) He seemed to be aware of

the power of the “court of public opinion” as he offered a televised counter-narrative that he knew would be well received in Serbia, saying on one occasion:

In the international public, for a long time and with clear political intentions an untruthful, distorted picture was being created in terms of what happened in the territory of the former Yugoslavia. Accusations levelled against me are an unscrupulous lie and also a tireless distortion of history. Everything has been presented in a lopsided manner so – in order to protect from responsibility those who are truly responsible and to draw the wrong conclusions about what happened and also in terms of the background of the war against Yugoslavia.[[30]](#footnote-30)

The Milošević trial perpetuated the contested narratives that existed before the trial started. Those pre-existing narratives were sustained throughout the trial because of the adversarial legal procedures.

**Judgments, Historical Record and Historical Narrative**

Do judgments reduce disputes over historical narratives? Do they establish a history closer to truth? Are they “second drafts of history”, as some authors claim.[[31]](#footnote-31) In the early years of the ICTY with the first judgment delivered, the presiding judge Antonio Cassese (1937-2011) expressed an expectation that the judgment would deliver judicial facts that “no revisionism or amnesia” could erase.[[32]](#footnote-32) How does this noble objective work in reality? Is a judgment the ultimate goal of justice? Or can the judgments sometimes fail to achieve justice and thus compromise the historical truth and cement existing polarized historical narratives? Or can they, especially when quoted selectively and out of context, sometimes serve as powerful arguments in the hands of deniers of past crimes?

In August 2016, some five months after the prounouncement of the ICTY Karadžić judgment , Deputy Prime Minister and Minister of Foreign Affairs of Serbia Ivica Dačić stated in the media that the ICTY Karadžić judgment exonerated former President Slobodan Milošević and the state of Serbia from any criminal responsibility for mass atrocities committed in Bosnia and Herzogovina.[[33]](#footnote-33)  To support this assertion Minister Dačić cited an online article in which the author quoted selected paragraphs from the judgment; he argued that these exonerated Milošević.[[34]](#footnote-34) The “news” on the exoneration of Milošević spread further via some well distributed online publications.[[35]](#footnote-35)

What do the cited paragraphs actually contain? Paragraph 3460 on page 1,303 states that Milošević provided assistance in personnel, provisions, and arms to Bosnian Serbs during the conflict.[[36]](#footnote-36) The same paragraph also concludes that there was no sufficient evidence to prove that Milošević had agreed with the common plan; that is, the plan to create the ethnically homogeneous Serb territories in Bosnia and Herzogovina cleansed of non-Serbs. The quoted paragraph might read as a negative statement about insufficency of evidence and in no way an assertion of Milošević’s – let alone Serbia’s – proven exoneration.

Minister Dačić added that the quoted paragraph also exonerated the State of Serbia.[[37]](#footnote-37) His words resonated in the region. He was not just any representative of the Serbian government; he was a politician who was responsible for the revival of the Socialist Party of Serbia (SPS), the party Milošević had founded in 1990. Once nicknamed by the media as Mali Slobo (Little Slobo) for his admiring imitation of Slobodan Milošević, Dačić took over the leadership of the SPS in 2006 and since 2008 the SPS has been a coalition partner in all subsequent governments of Serbia, continuing the political legacy of Milošević. In legal parlance it may be described as an “immaterial averment” – something not needed to be proved in order to convict Karadžić.

**Trial Archive as a Tool to Counter Deniers?**

When the former ICTY judge, Patricia Wald, wrote in 2008 about the aspiration of international courts “to record for history an account of war crimes as a hedge against future disclaimers that they never happened at all”,[[38]](#footnote-38) she did not mention the problem of management of the vast volume of the material every trial produces for an outside user. Trial archives of modern mass atrocities trials are vast to the point of being effectively impossible to search and thus more or less incomprehensible to outside users who might want to turn to them for infomation. The Karadžić judgment is 2,590 pages long, and the judgments in the trials of two or more accused can be even longer.

The ICTY judges in the ICTY Judgment rendered in the case of the Serb General Ratko Mladić went further than the judges in the Karadžić case in finding no links between General Mladić and the members of the JCE from Serbia. In paragraph 4238 of the Mladić ICTY Judgment rendered on 22 November 2017, the Trial Chamber found “that there was a plurality of persons including the following individuals: Radovan Karadžić, Momčilo Krajišnik, Biljana Plavšić, Nikola Koljević, Bogdan Subotić, Momčilo Mandić, and Mićo Stanišić.”[[39]](#footnote-39) All named individuals were officials from Republika Srpska. Whereas the judges in the Karadžić case found that the evidence confirmed that Jovica Stanišić, Franko Simatović, Željko Ražnatović and Vojislav Šešelj - the politicians and state officials from Serbia - did share the common plan in Bosnia and Herzogovina, the judges in the Mladić case did not find enough evidence that these individuals participated in the realization of the common criminal objective in Bosnia and Herzogovina. The judges in both trials agreed

that the evidence did not show that Slobodan Milošević participated in the realization of a commonly shared criminal objective.[[40]](#footnote-40)

Deniers of the crimes charged are likely to be able to find in the massive trial archives as well as in court judgments of such length, enough factual details or commentary or even a paragraph from a judgment taken out of context material on which to construct, advance or support an apologetic historical narrative, regardless of the verdict.

For example, how could outside research find any relevant evidence in the Milošević trial about a “common plan”?[[41]](#footnote-41) Some valuable evidence came from “insider” witnesses and from the contemporaneous records of high level meetings that were acquired from the State archives of Serbia for the purpose of connecting Milošević to the “common plan” for Bosnia and Herzogovina. For example, in the heat of the war in Bosnia and Herzogovina, where the Serbs were seizing territory by commission of crimes,[[42]](#footnote-42) representatives from Serbia, Republika Srspka (RS), a Serb entity in Bosnia and Herzogovina, and Republika Srpska Krajina (RSK), a Serb entity in Croatia, held a meeting at which Milošević stated as a common goal the unity of Serbs from Serbia, RS, and RSK:

We *de facto* have that because objectively and according to our relations, such as political, military, economy, cultural and educational, we have that unity. The question is how to get the recognition of the unity now, actually how to legalise that unity. How to turn the situation, which *de facto* exists and could not be *de facto* endangered, into being *de facto* and *de jure*?[[43]](#footnote-43)

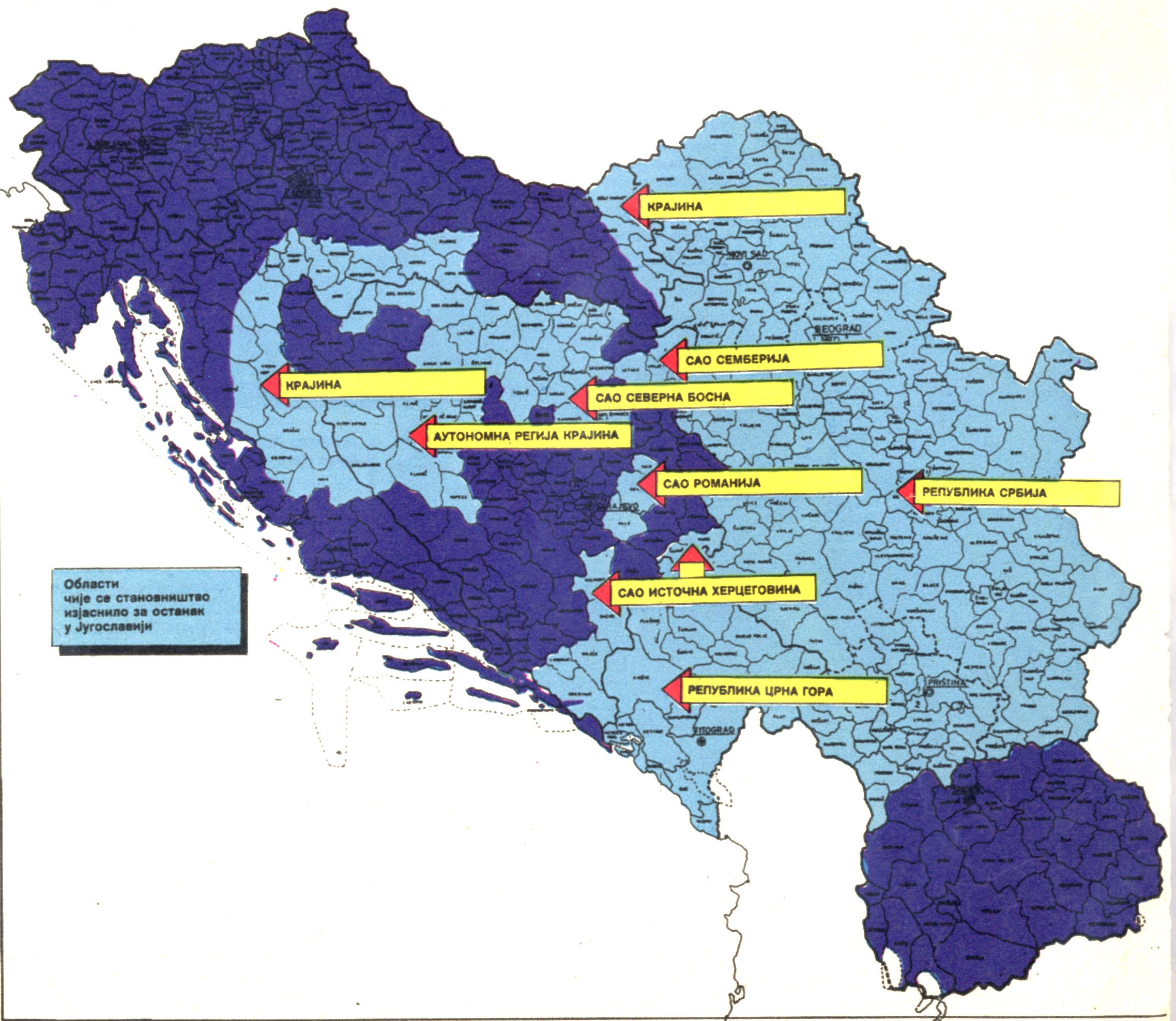
By 1994, nothing had changed in his thinking. Despite the formal rift with the RS leadership as of August 1994, which has been cited as relevant in the Karadžić judgment, Milošević, summarizing Serb political designs for Bosnia and Herzogovina at a SDC meeting on 30 August 1994, cited a “unanimous policy” among Serbs in the FRY, Bosnia and Herzogovina, and Croatia, revealing that Serb leaders had indeed shared a common plan, as alleged by the prosecution in the Milošević case:

By pursuing a unanimous policy, and quite successfully in my mind, we have managed to save [the FRY] from war, and at the same time rendered as much support as possible to our people across the Drina in creating Republika Srpska, in creating the Republika Srpska Krajina, and in winning them a normal status in the negotiations leading to an ultimate goal, which now even the international community has offered to recognise. And that is RepublikaSrpska, stretching over a half of the territory of the former Bosnia and Herzegovina![[44]](#footnote-44)

Milošević explained that the real victory of the war in Bosnia and Herzogovina was to see territorial conquests recognized by the international community. He said that Serb conquests were “the maximum that many have never even dreamed of”.[[45]](#footnote-45) In order to achieve ethnic separation in Bosnia and Herzogovina between the Serbs and two other ethnic groups – the Bosnian Muslims and Croats – Serb armed forces committed grave crimes. Milošević was on record admitting that without the war, ethnic separation in Bosnia and Herzogovina would have not been possible.[[46]](#footnote-46)

When Minister Dačić tried to use the Karadžić judgment for political purposes, his attempt backfired as the attention of the media in Bosnia and Herzogovina and Croatia turned to Dačić’s own role in the events leading to the war in the 1990s.[[47]](#footnote-47) Minister Dačić's contribution to Serbia's preparation for the war in Bosnia and Herzogovina from 1992 had been evidenced in the Milošević’s trial. The evidence came from “open sources”, a journal *Epoha* published in Belgrade by the governing Socialist Party of Serbia (SPS). The *Epoha* issue of 7 January 1992, included an article entitled "Yugoslavia for the Third Time". The 1992 article incorporated a tell-tale map of Bosnia and Herzogovina.[[48]](#footnote-48) The map depicted the designated “Serb municipalities” in Bosnia and Herzogovina, showing the municipalites in which a majority of Bosnian Serbs voted in the November 1991 referendum vote to stay in Yugoslavia. The results of that referendum were then used as a demarcation of the Serb designated territories in Bosnia and Herzogovina. The 1992 *Epoha* map roughly presented the projected western border of the designated Serbian State. In the subsequent war in Bosnia and Herzogovina that would start three months later, the Serb armed forces targeted almost all those “Serb municipalities” marked on the 1992 *Epoha* map in order to achieve ethnic separation in the Serb designated territories.

This correlation of evidence delivered a powerful example of how a trial record could be used to counter the deniers of past crimes. But the same example also signals the problem of how lengthy judgments of thousands of pages in addition to hundreds of thousands of pages of evidence – which are not readily accessible to journalists and outside users - make the work of deniers easier than it should be.



**Source:** ICTY, Exhibit P808a (Prosecution v. Slobodan Milošević, IT-02-54). The light color shows municipalities in Croatia and Bosnia and Herzogovina where the Serb population voted to stay in a Yugoslavia. These territories formed the basis of Serbia’s attempt to secure these territories and add them to the new State that was formed in 1992 by Serbia and Montenegro and called the Federal Republic of Yugoslavia (1992-2003).

LIMITATIONS OF LEGAL FORM TO PRODUCE COMPREHENSIVE HISTORICAL NARRATIVE

**Prosecutorial Discretion in Deciding Whom to Prosecute, For Which Crimes and on Which Legal Theory**

In some cases, an indictment and subsequent trial can lead to what could be termed either “under-prosecution” or “over-prosecution” if the defendant faces an indictment that is too narrow or too broad in temporal or geographical scope or gravity when compared with what really happened. Where the prosecution, for whatever reason, “under prosecutes”[[49]](#footnote-49) or “over prosecutes”,[[50]](#footnote-50) the State and all those responsible in the apparatus of the State may escape altogether, especially if one individual is “over-prosecuted” and is said – with the authority of the prosecution – to have been personally responsible for all that happened.

The historical narrative may be corrupted as a result. But if such a chosen defendant stands trial only to be acquitted at its conclusion, that may have significant impact on the legal and historical narrative.

The risks of over- or under-prosecuting are perhaps at their greatest in indictments charging political and military leaders for mass atrocities that took place over a long period of time. The lawyers have to be careful not to overstate or understate the powers of one single individual as political and military plans are usually conceived without a single originator. Typically they may be formed in cabinets, in war cabinets, during private conversations between leaders, even in public discussion in the media. Rarely does one individual formulate and put into effect a plan all on his own. With this reality in mind, the legal doctrine of Joint Criminal Enterprise (JCE) plays a significant role. The doctrine resembles what is termed a “conspiracy” in some national legal systems.[[51]](#footnote-51) The doctrine serves to link crimes to several, at times many, individuals who participated as perpetrators of crimes, or who acted as instigators, accomplices, or planners. While connecting some individuals to the commission of actual crimes, for example the killing of civilians, the doctrine allows forensic consideration of the interactions between – and cooperation among – all the individuals who may be members of a group or organization, and who may simply have acted in concert, for the purposes of the JCE.[[52]](#footnote-52)

The scope of the doctrine includes “common purpose”, where the members of a JCE – whatever their actual involvement in the commission of the crimes – shared a common understanding of its goals. At the ICTY, different levels of participation in a JCE were recognized; but each level required JCE members to have shared a common criminal purpose and to have, at a minimum, knowledge that crimes were being committed by others. Critics of the doctrine point to its inability to account for “(co)responsibility in case of functional fragmentation where the lines of communication between the accomplices are diffuse or are even completely obliterated”. But these criticisms overlook the realities of how mass atrocities can be directed without puppeteer strings being visible. And the law – with all its technical rules and doctrines – is expected to disclose the complex realties behind the crimes.

At the ICTY, separate but connected trials were often treated differently depending on the decisions made by the Chief Prosecutor or by a prosecution trial team leading a case. For example, in some indictments names of individuals feature as members of a joint criminal enterprise despite none of the mentioned individuals ever being indicted. Equally, some individuals who were never mentioned in any other ICTY indictment as members of a JCE have been indicted and tried. Once the crimes alleged against an individual have been charged and the indictment confirmed, those charges or “counts” in the indictment will have a major influence on the trial and eventually on the judgment. The same accused might be found guilty of some counts in the indictment but acquitted of others. An additional problematic reality is that different trial chambers of the same

tribunal or court might ascribe different value to evidence they have heard on similar or identical topics and come to different conclusions about relevant historical events. How can a historian evaluate an indicment and a related judgment and decide when an indictment or a judgment or both might be flawed.

**Flawed Indictment or Flawed Judgment?**

General Perišić, the Chief of Staff of the Army of Yugoslavia from 1993 to 1998, was indicted for crimes that happened on the territory of Bosnia and Herzogovina from 1992 to 1995. He had been indicted for aiding and abetting crimes committed by the Serbian Army of Krajina (*Srpska vojska Krajine* – SVK) in Croatia and by the Bosnian Serb Army (*Vojska Republike Srpske* – VRS) in Bosnia and Herzogovina, but was never named as a member of any JCE in any related ICTY indictment. Perišić’s indictment – for some reason - did not include the JCE legal doctrine at all.

The only names mentioned were of his subordinate officers who were sent by the Yugoslav Army (*Vojska Jugoslavije* – *VJ*) to fight for the Army of Republika Srpska (*Vojska Republike Srpske – VRS*), many of whom have been tried and some convicted by the ICTY.[[53]](#footnote-53) Neither General Perišić’s indictment nor the Prosecution evidence connected General Perišić, with any *de jure* political structures such as the SDC, or *de facto* lines of communication with any members of the SDC, such as Dobrica Ćosić and Zoran Lilić, two former Presidents of the Federal Republic of Yugoslavia who had been presiding members of the SDC during the war in Bosnia and Herzogovina, or with Momir Bulatović and Slobodan Milošević, two other voting members of the SDC during the war in Bosnia and Herzogovina.

The 2013 Appeals Chamber’s Judgment determined that Perišić, who was chief of staff of the VJ in the critical period when crimes charged in the indictment were committed in Bosnia and Herzogovina, was subordinated to then FRY President, Zoran Lilić – who was never named a member of a JCE nor was he indicted at any court. The Judgment further recounts that, although Perišić was one of many individuals participating at SDC meetings, the final decisions were taken by the President of the FRY, the President of Serbia, and the President of Montenegro.[[54]](#footnote-54)

According to the Judgment, the decision to provide VJ assistance to the VRS was adopted by the SDC before Perišić was appointed Chief of the VJ General Staff in 1993. This assistance – and its consideration at SDC meetings he attended – continued during Perišić’s term of office with the SDC reviewing both particular requests for assistance and the general policy of providing aid to the VRS and the SVK. The Appeals Chamber did find the VRS to be linked to the crimes against civilians but added that not all VRS activities were criminal in nature. The Appeal Chamber further considered whether Perišić implemented the SDC policy of assisting the VRS war effort in a manner that redirected aid towards VRS

crimes and decided that evidence relating to General Perišić’s contributions at meetings of the SDC did not suggest that he advocated specifically directing aid to support VRS crimes, but that he simply supported the SDC policy of assisting the VRS.

The judgment, were it to survive unchallenged, was immediately seen around the world as favoring senior military commanders. Critical appraisals of the judgment expressed concerns about significant changes brought about by judicial precedent concerning aiding-and-abetting liability, which had previously required proof of only two elements to establish guilt. First, that the accused knew that his conduct had a substantial likelihood of aiding a crime. Second, that the aid provided had a substantial effect. The Perišić judgment introduced a third element, namely that the accused must be proven to have “specifically directed” the crime.[[55]](#footnote-55) The Perišić Appeals Judgment was based on the premise that the VRS – the Bosnian Serb army commanded by Ratko Mladić – were engaged in a legitimate military effort and that Perišić was aiding the legitimate war activities, with no evidence that he “specifically directed” the aid to the commission of crimes.[[56]](#footnote-56)

So what do acquittals actully mean in legal terms? In the words of former ICTY judge, Lord Iain Bonomy, a court judgment of acquittal in a criminal case does not rule that an accused is "innocent".[[57]](#footnote-57) Judgments can only determine whether an accused is found guilty of the allegations brought against him or her in the indictment. The Prosecution must prove these allegations beyond “resonable doubt”.

Failing to rely on the JCE legal doctrine, the Prosecution did not even try to establish an evidentiary connection between General Perišić and the leaders of the RS, the RSK, the FRY, and Serbia in articulating a “common plan”. Perhaps if the OTP had decided to indict all three voting members of the SDC together with Perišić and other high ranking political and military non-voting members, who attended the planning meetings of the SDC, the course of the trial, and the evidence, might have resulted in a different judgment.

Criminal cases can be won by a combination of a sound legal theory and persuasive trial evidence. The prosecution and defence produce evidence with the burden of proof being on the prosecution. The last word in evaluating the evidence when rendering the judgment will have to be the judges.

**Power of States in Providing or Obscuring Evidence**

To what evidence do prosecutors and judges have access? And what follows from the reality that evidence in high level cases will need to come from the States that were involved in the war? The ICTY experience showed that not all relevant parties engage in legal processes with justice and truth in mind. There are examples, at national and international courts dealing with mass atrocities, of outside interventions by States aiming to suppress evidence, to undermine truth, and to create a counter-narrative for various reasons. States might act other than in the genuine pursuit of justice, even when they are compelled to cooperate with international criminal tribunals and courts to open

State archives, to make documentary evidence available at trials, and to facilitate access to witnesses by the threat of United Nations or European Union sanctions. If so, and in order to avoid being sanctioned, the States might engage in a subtle play of appearing to cooperate, while in reality trying – sometimes with marked success – to keep damaging evidence from a court and from the public. There can be no doubt that the cooperation of States when it comes to the production of evidence is of paramount importance for the success and integrity of mass atrocities trials.

Notwithstanding the huge amount of audio, video, and written material that exists about the Yugoslav conflicts, ICTY prosecutors – unlike their Nuremberg counterparts – did not have full or easy access to documentary material from the archives of former leader Milošević’s country.[[58]](#footnote-58) Documents from the official archives of the FRY and Serbia, [[59]](#footnote-59) considered more important from a forensic point of view than open source materials, were difficult and sometimes impossible to obtain. This was in stark contrast to the experience of prosecutors in Nuremberg, where Allied Powers had simply seized the State and Nazi Party archives of defeated Germany for use as evidence in court. Some of the most valuable evidence for the trials of Serb indictees, especially for high level Serb political and military leaders, was in the State archives of Serbia.

Milošević‘s trial was, to a degree, a breakthrough for the ICTY in its cooperation with Serbia. With Milošević in custody in 2001 and the trial about to start in 2002, the ICTY turned to Belgrade for evidence. The ICTY investigation focused on evidence of Milošević’s individual responsibility for using armed forces in the campaign of ethnic cleansing in the Serb designated territories in Croatia and Bosnia and Herzogovina. Milošević was charged at the ICTY as an individual with genocide in Bosnia and Herzogovina, at Srebrenica, and a number of other municipalities. In parallel, Serbia *as a State* was facing allegations laid by Bosnia and Herzogovina in 1993 at the International Court of Justice (ICJ) that it had breached the 1951 Genocide Convention.[[60]](#footnote-60) It was not only Milošević who stood trial for criminal responsibility for the crime of genocide, for at the ICJ a Genocide Convention breach can only be proved by first establishing the commission of the relevant crime. The extended fourteen years of ICJ proceedings against Serbia were running in parallel with the Milošević trial at the ICTY for four years, from 2002 to 2006. There was a considerable “overlap” of evidence needed to prove Milošević’s culpability at the ICTY and evidence needed to prove Serbia’s convention breaches at the ICJ given that Milošević was charged with genocide at Srebrenica and six other BiH municipalities.[[61]](#footnote-61)

The ICTY prosecution investigators found valuable evidence in the collections of documents of three important political bodies that had powers to command armed forces: the Presidency of The Socialist Federal Republic of Yugoslavia (PSFRY – *Predsjedništvo SFRJ*); the Supreme Defense Council (SDC or VSO - *Vrhovni savet odbrane*); and the “Joint Command” (*Zajednička komanda*) for Kosovo. These were the highest State bodies in charge of commanding the armed forces in the different periods of the three wars: the Presidency of SFRY was relevant for the Croatian and Bosnia and Herzogovina wars; the SDC for the Croatian, Bosnia and Herzogovina, and Kosovo wars; and the Joint Command only for the Kosovo war.

Serbia's cooperation strategy in relation to the ICTY focused on keeping as much evidence as possible in the Milošević trial from public exposure if it was judged that it could be of use to Bosnia and Herzogovina in the ICJ proceedings. Minister of Justice Nebojša Šarkić of the FRY, “gave the game away” on one occasion when explaining that the release of the requested documents would only “be possible upon termination of disputes of FR Yugoslavia with Bosnia and Herzegovina and Croatia before the International Court of Justice (ICJ)”.[[62]](#footnote-62)

The number of documents requested but not received from Serbia grew significantly in the course of 2002; this prompted the Milošević prosecution team to initiate in December 2002 a procedure known as “Rule 54 *bis*”, by which the Court can issue orders to States for production of documents. In the case of unsatisfactory cooperation, the ICTY Office of the Prosecutor (OTP) - or a defense team if in a similar position - could start the Rule 54 *bis* procedure, allowing the parties, in theory, to obtain the documents through a court order. In practice, the process of acquiring relevant evidence by a court order could take months or years and, in some cases, the requested evidence was never handed over.[[63]](#footnote-63)

But in the immediate post-Milošević period, Serbia’s leadership appeared to be less interested in meeting a State obligation to cooperate with the ICTY for the purpose of rendering justice and establishing truth than in instrumentalizing its “cooperation” for a variety of political goals: to fight political opponents, to obtain international financial aid, and to gain admission to the European Union.[[64]](#footnote-64) But perhaps the most important goal was to keep evidence from the the International Court of Justice (ICJ), because evidence requested for the trial of Slobodan Milošević by the ICTY could also be used against the State of Serbia at the ICJ.[[65]](#footnote-65)

Serbia would cite numerous reasons for noncompliance in their responses to OTP requests, from disappearance of documents during the NATO bombardments of premises where they had been stored to blunt denials of their existence in the first place. Serbia dragged out the process of “cooperation” with long and intensive negotiations with the prosecution, sometimes succeeded by direct “deals” with the Chief Prosecutor to secure protection from public view for the parts of the high level records that were selected as potentially damaging for Serbia at the ICJ.

**Obscuring Evidence Needed to Prove Genocide**

In February 2007 – less than one year after Milošević’s death – the ICJ rendered its judgment[[66]](#footnote-66) that the crime of genocide in Bosnia and Herzogovina did occur, but only in 1995 and only in the Srebrenica area. It is important to note that the 2007 ICJ judgment had been rendered without the judges having allowed themselves to review the documents or the parts of documents protected by the ICTY from public view. Among these documents were the records of the SDC, which were protected from public view by the ICTY at the request of Serbia. Milošević’s *de jure* position during the war in Bosnia and Herzogovina was linked to his role on the SDC. The SDC had been established as the joint Commander-in-Chief of the FRY armed forces by the 1992 FRY Constitution and the SDC’s first session was held in June 1992. It was formed of the Presidents of the FRY and the Republics of Serbia and Montenegro; as President of Serbia, Milošević was a member of the SDC throughout the Bosnia and Herzogovina war years. The records of those high-level meetings featured Milošević as a speaker on policy issues and recorded his precise words that captured his state of mind before, during, and after the conflict in which the Serb forces committed atrocities in Croatia, Bosnia and Herzogovina, and Kosovo. These documents link Milošević – and other members of the SDC – to the Bosnian and Croatian Serb leaderships during the 1990s wars. They are useful evidence on the *de facto* and *de jure* power of Slobodan Milošević and the power circles around him, exposing the ways in which they schemed and plotted together in order to establish and re-draw Serbia’s borders by force.[[67]](#footnote-67)

**Accidental Disclosure of Protected Evidence**

After the ICJ rendered judgment, confirming the earlier ICTY judgments,[[68]](#footnote-68) that the crime of genocide in Bosnia and Herzogovina did occur but only in 1995 and only in the Srebrenica area, Serbia seemed to have been able to accomplish its goals as stated by its officials on numerous occasions.[[69]](#footnote-69)

But an unexpected development followed, as some protection of the selected portions of those documents was lifted informally and without court approval when Momir Bulatović published a book, *Unspoken Defence*, in which he quoted from protected portions of a number of SDC transcripts.[[70]](#footnote-70) However, the ICTY made no efforts to challenge or amend the original decisions on protection or to sanction Bulatović. Bulatović’s book would have been ignored by the public if it were not for an article published by International War and Peace Reporting (IWPR) in November 2007. The author of the article wondered how it was possible that neither the team who presented the Bosnian genocide case before the ICJ nor the ICTY Prosecution team had used Bulatović’s publication of some of the protected parts to initiate legal proceedings to lift the protections.[[71]](#footnote-71) The November 2007 IWPR publication might have been used as a trigger for the Bosnian legal team to start the process of a revision of the ICJ judgment rendered in February 2007 and for which an application for “revision” could, under the ICJ statute, be made in the following decade until February 2017, not beyond; but it did not happen. It also did not happen in 2011, four years later, when the ICTY made available to the public the majority of the protected portions of the SDC documents, which were released from their protection[[72]](#footnote-72) in the trial of General Momčilo Perišić, the Chief of Staff of the VJ from 1993 to 1998. [[73]](#footnote-73) But, after much publicity, the Appeals Chamber in the Perišić case did not apparently find these documents persuasive enough as he was acquitted.

As it is now – with Perišić not tried for genocide at all and acquitted, Milošević dead, and other SDC members never indicted – the historical record leaves the FRY and Serbia free to say they were nothing but observers of the tragedies taking place in the neighboring States of Bosnia and Herzogovina and of Croatia. Many would argue that this is a travesty of the truth. Moreover, by deadline in February 2017 Bosnia and Herzogovina failed to file a revision at the ICTY.[[74]](#footnote-74) With the ten years period of limitation expired, there will be no legal remedy even if and when the most compelling evidence becomes accessible to the public.

For historical narrative, the 2013 Perišić Judgement and the 2007 ICJ judgment devalued the legal importance of the SDC records. None of the legal procedures dealing with the SDC records sufficiently stressed to the outside audience that those redacted pages finally available did not tell the full story. The majority of the SDC records for 1995 – the year that Srebrenica genocide took place – have never been handed over and are still missing. Once

they appear by chance or by deliberate search in the future, historians might have the last word in reconstructing of sequence of the events and decisions that had led to genocide. This is where historians may take the lead and continue filling the gaps and answering the open questions about the individual responsibility of the Serb politicians and military, as well as of Serbia as the State, for the crimes of genocide that occured in Bosnia and Herzogovina from 1992 to 1995.

AN UNFINISHED MASS ATROCITIES TRIAL AND ITS

EXTRALEGAL VALUE

All ICTY trial archives represent valuable historical sources because they contain an immense, unique collection of documentary evidence, testimonies, and legal documents. Materials selected as evidence by the prosecution and defence incorporate documents from Yugoslav, Serbian, Kosovo, and Bosnian State archives that would have otherwise been unavailable to the public and to researchers for many decades.

The Milošević trial – although unfinished – serves as a valuable historical source for at least two reasons. First, Milošević represented himself in court, and therefore responded personally to the evidence presented, but also made personal remarks throughout the trial from the standpoint of a man attempting to defend his political and private decisions. Second, evidence that did come directly from State archives in Serbia makes the Milošević trial record particularly valuable, as it includes State documents that would otherwise have remained protected for decades or even longer.

The Milošević trial archive comprises transcripts, material tendered as evidence, motions on administrative and procedural matters, and decisions and judgments of the Trial Chamber and Appeals Chamber. The archive is so large that it is too substantial to be analyzed in a single study. Nonetheless, missing source materials – such as the critical 1995 SDC records – that were requested but never produced represent a gap; meaning that the trial record, while vast, is not comprehensive or exhaustive. Despite its size, a trial record alone might be insufficient for the task of historical research, and sources from outside the trial proceedings – such as theoretical and historical academic writings and so called “extratrial material”[[75]](#footnote-75) – will be used by historians.

*MASS ATROCITIES TRIAL AS A HISTORICAL SOURCE*

The historical record of this trial due to its size will remain an amorphous mass if not filtered by relevance accorded thereto by a researcher. This is why a historical record might be best exploited when specific transcripts, documents, or videos are selected for their value as a historcal source.

Marrus made a valid point that the trial archive of any mass atrocities trial should be treated just as any other historical source. He emphasized that historians must evaluate

every source with an eye to its provenance, because all sources are in some sense “tainted”, and war crimes trial records are certainly no exception.[[76]](#footnote-76) Using a trial archive as a historical source can influence historical narrative, but not in the sense that there will ever be one uncontested historical narrative. Evidentiary focus of criminal proceedings might unwittingly influence historical interpretation and create what has come to be known, because the Holocaust trials in Nuremberg, as an “intentionalist” view of the historical period in question. Thus reliance on the Nuremberg trials archives has led historians to maintain that the Holocaust resulted from an explicit master plan created by Adolf Hitler himself and implemented top-down.[[77]](#footnote-77) Only later was attention directed to the role of minor bureaucrats and functionaries at all levels of German society – an approach that yielded a “functionalist” interpretation focused on the complicity of ordinary Germans in the Holocaust, to such an extent that some scholars now ascribe the adoption of the Final Solution primarily to social and political pressures working their way bottom-up.[[78]](#footnote-78)

So did the Milošević trial archive contribute to the already existing historical narratives? The part Milošević played in events of the 1980s and 1990s has been explored in a number of political biographies. The best known of these biographies, written in both English and Serbian, were published before his trial or in the same year that it started.[[79]](#footnote-79) This means that only few authors presented the trail of evidence that was followed in the courtroom to establish responsibility for the break-up of Yugoslavia and, more importantly, the violence that followed.

A majority of authors agree that Milošević played a central role in events that unfolded in the former SFRY between 1987 and 1999.There are at least three categories of interpretations of Milošević’s role in the disintegration of Yugoslavia that could be identified so far: intentionalist, relativist, and apologist. “Intentionalists” see Milošević as having dictated the pace of the Yugoslav crisis through well-articulated and planned objectives that drove the other republics away. According to this view, violence was used cynically and practically with a clear purpose.[[80]](#footnote-80)

Alternative to this are authors who tend to see Milošević as an intelligent and ruthless politician but not a good tactician or strategist, whose politics were mostly reactive.[[81]](#footnote-81) These “relativists” see Milošević’s policies as responses to developments that

were driven by leaders of Slovenia, Croatia, Bosnia and Herzogovina, and Kosovo, and by the international community. From this standpoint, Milošević genuinely wanted to preserve Yugoslavia but did not succeed.[[82]](#footnote-82) Relativists perceive Milošević as an ambitious politician who endeavored to achieve more than he was capable of; and his rule has been cast by authors in this camp as a sequence of mistakes and failures – at the national and international levels.[[83]](#footnote-83) The violence that accompanied the disintegration of Yugoslavia is thus explained as resulting from a complicated interplay of many factors, leading to an escalation of the crisis that was beyond the control of Milošević alone.

“Apologists” share the opinion held by relativists regarding the role of the republics that sought independence and of the international community in the disintegration of Yugoslavia. Yet they not only see his goal to preserve Yugoslavia as well-intentioned but also defend his politics and decision-making in general.[[84]](#footnote-84) They downplay Milošević’s calculating and ruthless side to recast him as a clumsy, wayward, and inconsistent authoritarian leader who merely failed to deliver on promises he made.[[85]](#footnote-85)

With Milošević dead and his trial archive left behind to be studied, there is no doubt that most of the prosecution evidence would support, as a rule, an “intentionalist” interpretation of the history and that evidence of the defense, an “apologetic” or “relativist” interpretation. It may be unrealistic to expect that mass atrocities trials could ever produce one uncontested historical narrative and one shared collective memory. In reality, a plurality of narratives seems more probable, more democratic, and maybe more desirable than one overall narrative. Over the course of time, the historical narrative most certainly will develop and change with the emergence of new sources and with new theoretical insights long after a trial ends.

CONCLUSIONS

Mass atrocities trials – just as any other criminal trials – are there to render justice and mete out punishment. The ICTY examples show that justice can be interpreted and perceived in many different ways. It is almost impossible to identify any ICTY judgment and a sentence delivered in the last twenty years that was greeted with approval by all sides involved in the Yugoslav wars. Every judgment – conviction, judgments on pleas of guilty, or acquittal – has led to divisive and often emotional reactions of those who found the judgments

either too lenient or too harsh; the trials unfair, non-transparent, or incomprehensible; and the courts politicized.

And some of these criticisms, however expressed, may not be completely unfair or without foundation. It is obviously impossible for mass-atrocities trials to produce the “real truth” or some form of uncontested historical narrative(s), not least because the procedural restrictions inherent in such trials that are bound to limit their ability to record a completely accurate history. There are limitations of jurisdiction, limitations of the adversarial legal system generally coupled with restrictive rules of adversarial systems on the admissibility of evidence. Prosecutorial discretion about whom to indict, for which crimes, and for which charges adds to those limitations as may confidentially obtained (and thus secret) protection of some evidence from public view. Plea agreements between the accused and the prosecution when defendants plead guilty can narrow public knowledge of the real gravity of the crimes committed in some geographical area or by some military unit or controlling political body; the public assumption will be that the agreement reflects what actually happened whereas it may have been made to save time or because some evidence was weak and the prosecution were never certain of getting convictions – or for other reasons.

Will judges and lawyers have the last word when it comes to the establishing of a dominant or uncontested historical narrative? Not likely, although when judges produce careful balanced judgments on properly presented evidence, their analysis and judgments may be of far greater value than some single piece of evidence deployed by polemicist, politician, or historian.

Accordingly, the historical record left by such courts may be vast but is bound to be incomplete. This fact must never be sidestepped out of enthusiasm for some court judgments favorable to a particular cause; nor should it allow the immense part that court records can play in setting historical narratives be diminished. And even this recognition does not capture all the caution with which we should consider trial records.

The fact that international criminal trials focus on the criminal responsibility of individuals for mass atrocities raises the question of whether it should be only individuals who should bear the burden of criminal accountability for what may have been State violence committed over a long period of time through the agency of institutional structures. Selecting a relatively small number of individuals to prosecute for crimes that occurred over a protracted period of time – as has been the case since the establishment of the international criminal courts and tribunals from 1993 onwards – can lead to historical “simplification”, where too much focus on an individual can overshadow the long-standing historical processes that have led to the commission of mass atrocities.

In addition to these proper restrictions inherent to the ways mass atrocities trials operate, it is necessary to be realistic about the power that States will exercise to control evidence when they fear for their their national interest – whether or not those fears should be respected as a matter of law. What States have done, and may continue to do, can be seen as improper; but it should be remembered that it is not entirely dissimilar from what defense lawyers can properly do when they know of or have in their possession but do not produce in court evidence that is perceived as adverse to their client.

With all these conclusions in mind, the most profound difference between legal and historical narratives is that the legal narrative as captured in trial transcripts, evidence, or

in judgments will remain frozen in time. If new evidence emerges that allows re-opening the trial or a re-trial, it has to happen while a defendant is alive. After a defendant dies, new evidence that might emerge will be left to historians to record, evaluate and judge.

1. \* PhD, University of Amsterdam, Executive director Geoffrey Nice Foundation on law, History, Politics, and Society in the Context of Mass Atrocities; author, Prosecuting Slobodan Miloševi’ (2016)/

   The term “mass atocities trials” herein means trials based on international jurisdiction to deal with war crimes, crimes against humanity, genocide, and breaches of the customs of war. These types of trials have also been referred to as “war crimes trials” or “international (criminal) trials”. [↑](#footnote-ref-1)
2. The first *ad hoc* international criminal courts after the Cold War were the United Nations tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR). The tribunals for Cambodia, Sierra Leone, and Lebanon followed. The most recent *ad hoc* tribunal, the Kosovo Special Chamber, became operational in 2016, and has yet to issue its first indictment. In 2002 the first permanant international criminal court, International Criminal Court (ICC), was founded. [↑](#footnote-ref-2)
3. The ICTY trial against the Serbian President Slobodan Milošević that lasted from 2002 to 2006 was perhaps the best known unfinished trial. [↑](#footnote-ref-3)
4. The International Criminal Tribunal for Former Yugoslavia (ICTY) was initially mandated to put an end to crimes and to take effective measures to bring to justice the persons responsible for them. United Nations Security Council Resolution 827 of May 1993 enlarged this mandate, stating that the establishment of ICTY “will contribute to ensuring that such violations of international humanitarian law are halted and effectively redressed”. The same Resolution confirmed that one objective of the ICTY was “to contribute to the restoration and maintenance of peace”. See: United Nations Security Council, Resolution 827, S/RES/827, 20 May 1993. [↑](#footnote-ref-4)
5. In 1945, *ad hoc* military tribunals in Nuremberg and Tokyo were established to try high-level German and Japanese perpetrators, for example. But it was not until nearly the end of the twentieth century that international political circumstances allowed for the establishment of another internationaltribunal, to address individual criminal responsibility for crimes committed in the former Yugoslav republics. [↑](#footnote-ref-5)
6. For discussion on this debate in general, see: H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963); L. Bilsky, *Transformative Justice*: *Israeli Identity on Trial* (2004); I. Buruma, *Wages of Guilt: Memories of War in Germany and Japan* (1995); L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001); F. Gaynor, “Uneasy Partners: Evidence, Truth and History in International Trials”, *Journal of International Criminal Justice*, X (2012), pp. 1257-1275. C. Maier, “Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commissions”, in R. I. Rotberg and D. Thompson, *Truth v. Justice: The Morality of Truth Commissions* (2000), pp. 261-278; M. R. Marrus, “History and the Holocaust in the Courtroom,” in *Lessons and Legacies*, ed., R.M. Smelser, vol. 5, *The Holocaust and Justice* (2002), pp. 215–239; G. Nice, *Justice for All and How to Achieve it* (2017); Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (1997); Gerry Simpson, “Didactic and Dissident Histories in War Crimes Trials”, *Albany Law Review,* LX (1997), pp. 801-839; R. Teitel, *Transitional Justice* (2000); W. A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (2012); N. Tromp, *Prosecuting Slobodan Milošević; The Unfinished Trial* (2016); R. Wilson, “Judging History: The Historical Record of the International Criminal Tribunal of the Former Yugoslavia”, *Human Rights Quarterly*, XXVII (2005); R. Wilson, *Writing History in International Criminal Tribunals* (2011). [↑](#footnote-ref-6)
7. Hannah Arendt quotes – with approval - Nuremberg Executive Trial Counsel Robert Storey that “the purpose of a trial is to render justice, to mete out punishment, and nothing else”, in Arendt, Ibid., p. 233. [↑](#footnote-ref-7)
8. Buruma, note 6 above, p. 142. [↑](#footnote-ref-8)
9. Gaynor, note 6 above, p. 1260. Gaynor quoted R. May and M.Wierda, “Evidence before the ICTY”, in R. May, D.Tolbert and J. Hocking (eds.), *Essays on the ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (2001), p. 253. [↑](#footnote-ref-9)
10. International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946* (Nuremberg: International Military Tribunal, 1947-1949), III, p. 92. [↑](#footnote-ref-10)
11. Douglas, note 6 above, p. 3. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Bilsky,note 6 above, p. 7. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Ibid., p. 8. [↑](#footnote-ref-15)
16. Teitel, note 6 above, p. 70. [↑](#footnote-ref-16)
17. Ibid., p. 73. [↑](#footnote-ref-17)
18. Ibid. [↑](#footnote-ref-18)
19. Ibid. [↑](#footnote-ref-19)
20. Gaynor, note 6 above, p. 1260 [↑](#footnote-ref-20)
21. Ibid., p. 1259. [↑](#footnote-ref-21)
22. B. V. A. Röling and A. Cassese, *The Tokyo Trial and Beyond* (1993), p. 50. [↑](#footnote-ref-22)
23. Sir Geoffrey’s lecture at Master Class on Law, History, Politics and Society in the Context of Mass Atrocities, Dubrovnik, 10 July 2016. [↑](#footnote-ref-23)
24. Otto Kirchheimer, a legal scholar of German origin, published his seminal work in which he examined the uneasy balance between abstract justice and political expediency. See O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961). [↑](#footnote-ref-24)
25. Ibid., p. 324. [↑](#footnote-ref-25)
26. “At Nuremberg, with twenty-two defendants, including Martin Bormann (1900-1945) who was tried in absentia, the accused quite often disagreed among themselves in describing what had happened in Nazi Germany and reacted quite differently to accounts of the persecution and murder of European Jews.” See Marrus, note 6 above, p. 229. [↑](#footnote-ref-26)
27. Douglas, note 6 above, p. 5. [↑](#footnote-ref-27)
28. The ICTY is a United Nations *ad hoc* court established in the middle of the Bosnian war to investigate and prosecute the crimes that took place in the 1990s on the territory of the former Yugoslavia. Between its May 1993 creation and its closure in December 2017, the ICTY indicted 161 individuals of whom 94 were ethnic Serbs. [↑](#footnote-ref-28)
29. Ibid., p. 256. [↑](#footnote-ref-29)
30. *Prosecutor v. Slobodan Milošević*, ICTY Case No. IT-02-54-T, 31 August 2004, T 35218:01-35215:10. [↑](#footnote-ref-30)
31. Wilson: note 6 above, pp. 909 and 942. [↑](#footnote-ref-31)
32. Gaynor, note 16 above, p. 1260. Gaynor quotes R. May and M.Wierda, “Evidence before the ICTY”, in R. May, D.Tolbert and J. Hocking (eds), *Essays on the ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (2001), p. 253. [↑](#footnote-ref-32)
33. See “ICTY judgment in Karadžić case exonerates Milošević from responsibility for crimes in Bosnia,” *EBL News*, 14 August 2016, at: https://eblnews.com/news/balkan/icty-judgment-Karadžić-case-exonerates-milosevic-responsibility-crimes-bosnia-33078 [↑](#footnote-ref-33)
34. See A. Wilcoxon, “[The Exoneration of Milošević : the ICTY’s Surprise Ruling](https://www.counterpunch.org/2016/08/01/the-exoneration-of-milosevic-the-ictys-surprise-ruling/)”, *CounterPunch*, 01 August 2016, at: https://www.counterpunch.org/2016/08/01/the-exoneration-of- Milošević-the-ictys-surprise-ruling/. [↑](#footnote-ref-34)
35. “The ICTY conclusion, that one of the most demonized figures of the modern era was innocent of the most heinous crimes he was accused of, should have made headlines across the world. Even the ICTY buried it, deep in its 2,590-page verdict in the trial of Bosnian Serb leader Radovan Karadzic, who was convicted in March of genocide (at Srebrenica), war crimes and crimes against humanity”. See N. Clark, “Milosevic exonerated, as the NATO war machine moves on”, *Russia Today*, 03 August 2016, at: https://www.rt.com/op-edge/354362-slobodan-milosevic-exonerated-us-nato/ [↑](#footnote-ref-35)
36. G. Knežević, "Milosevic 'Exonerated'? War-Crime Deniers Feed Receptive Audience," *Radio Free Europe*, 09 August 2016, at: https://www.rferl.org/a/milosevic-war-crime-deniers-feed-receptive-audience/27910664.html [↑](#footnote-ref-36)
37. See for example: <http://www.telegraf.rs/vesti/politika/2344010-dacic-presuda-karadzicu-je-dokaz-da-je-srbija-nije-kriva-za-ratne-zlocine> (accessed 22 September 2017) [↑](#footnote-ref-37)
38. P. Wald, “Forward: War Tales and War Trials”, *Michigan Law Review*, CVI (2008), p. 915. [↑](#footnote-ref-38)
39. *Prosecutor v. Ratko Mladić*, ICTY Case No. IT-09-92-T. §4238, p. 2090. [↑](#footnote-ref-39)
40. Ibid. In footnote 15357 to §4238, the judges listed names of the individuals from Serbia, including Milošević for which no evidence for JCE participation was found. [↑](#footnote-ref-40)
41. Three broad physical elements are shared by all three categories of joint criminal enterprise: (a) a plurality of persons; (b) the existence of a common plan, design, or purpose that amounts to or involves the commission of a crime or underlying offence provided for in the Statute; and (c) the participation of the accused in the common plan, design, or purpose. See for example *Prosecution vs.* *Milutinovic et al. Judgment*,ICTY Case No. IT-05-87, 40. Following the acquittal of Milan Milutinović, the name of the case was changed from *Milutinović et al*. to *Šainović et al*, at: <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf> (accessed 22 September 2017) [↑](#footnote-ref-41)
42. Milošević said at the meeting that without war, ethnic separation in Bosnia and Herzogovina would have never been possible. “Stenographic transcript of the session of the State Council for Harmonisation of Positions on State Policy”, 09 January 1993, *Prosecution v. Milošević*, Exhibit P469.40, p. 70. [↑](#footnote-ref-42)
43. Ibid., p. 69. [↑](#footnote-ref-43)
44. “Stenographic transcript of the 25th session of the Supreme Defence Council,” 30 August 1994, *Prosecutor v. Perišić*, Exhibit P00778.E, 37. The same document was tendered as an exhibit P667.25 in *Prosecution v. Milošević*. [↑](#footnote-ref-44)
45. Ibid., p. 39. [↑](#footnote-ref-45)
46. “Stenographic transcript of the session of the State Council for Harmonisation of Positions on State Policy”, 09 January 1993, *Prosecution v. Milošević*, Exhibit P469.40., p. 70. [↑](#footnote-ref-46)
47. See for example: <http://novi.ba/clanak/88814/nevenka-tromp-zlocinac-a-ne-heroj-i>; <http://www.slobodnabosna.ba/vijest/46585/zasto_se_ivica_dachic_plasi_revizije_presude_prochitajte_tekst_sefa_srbijanske_diplomacije_koji_je_koristen_kao_dokaz_protiv_milosevica.html>; <http://www.direktno24h.com/pogledajte-zasto-se-mali-sloba-boji-revizije-ovako-je-dacic-nekada-crtao-krvave-karte-velike-srbije/>; <http://bportal.ba/foto-zasto-se-mali-sloba-boji-revizije-ovako-je-dacic-nekada-crtao-karte-velike-srbije/>. [↑](#footnote-ref-47)
48. I. Dačić, “Yugoslavia for the Third Time”, *Epoha* No. 12, 7 January 1992, Exhibit P808a , *Prosecution v. Slobodan Milošević*, ICTY Case No. IT-02-54. [↑](#footnote-ref-48)
49. One can argue that the ICTY indictment of General Momčilo Perišić led to “under prosecution” and eventually to his acquittal. [↑](#footnote-ref-49)
50. One early example of “over prosecution” is probably the case of Tihomil Blaškić, a Bosnian Croat military commander, who was first sentenced to 45 years imprisonment. The Appeals Chamber reduced the sentence to 9 years. [↑](#footnote-ref-50)
51. “Joint Criminal Enterprise” denotes a mode of criminal liability of all participants in a common criminal plan. See A. Cassese “The Proper Limits of Individual Responsibility under Doctrine of Joint Criminal Enterprise”, *Journal of International Criminal Justice*, V (2007), pp. 110-111. [↑](#footnote-ref-51)
52. See for discussion H. van der Wilt “Joint Criminal Enterprise: Possibilities and Limitations”, *Journal of International Criminal Justice*, V (2007), pp. 91-108; A. M. Danner and J. S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law”, *California Law Review*, XCIII (2005), p. 108. [↑](#footnote-ref-52)
53. Some names mentioned in the indictment as Perišić’s subordinates were: General Ratko Mladić, General Dragomir Milošević, General Stanislav Galić, General Zdravko Tolimir and Colonel Vujadin Popović. All of them have been tried at the ICTY and found guilty for the crimes committed in Sarajevo and Srebenica, two notorious crime sites in the Bosnia and Herzogovina War. [↑](#footnote-ref-53)
54. See *Prosecutor v. Momčilo Perišić*, Appeals Judgment and Summary Judgment, ICTY Case No. IT-04-81-A, 28 February 2013, at:

    <http://www.icty.org/x/cases/perisic/acjug/en/130228_judgement.pdf>; <http://www.icty.org/x/cases/perisic/acjug/en/130228_summary.pdf> [↑](#footnote-ref-54)
55. K. Roth, “A Tribunal’s Legal Stumble”, *New York Times*, 9 July 2013, at: http://www.nytimes.com/2013/07/10/opinion/global/a-tribunals-legal-stumble.html?\_r=0 [↑](#footnote-ref-55)
56. E. Gordy, “Hague Verdicts Allow Commanders to Evade Justice”, *BIRN*, 01 March 2013, at: http://www.balkaninsight.com/en/article/hague-verdicts-allow-commanders-to-evade-justice [↑](#footnote-ref-56)
57. Lord I. Bonomy, Lecture at the “Master Class on law, History, Politics and Society in the Context of Mass Atrocities,“ held at the Inter University Centre, Dubrovnik, 11 July 2016. [↑](#footnote-ref-57)
58. See the sections titled “State Cooperation” or “Cooperation” in the Annual Reports submitted by the ICTY President to the UN Security Council from 2000 to 2006, at: http://www.icty.org/tabs/14/1. [↑](#footnote-ref-58)
59. The FRY, or the Federal Republic of Yugoslavia, existed from 1992 to 2003 as a federation of the republics of Serbia and Montenegro. In 2003, it became known as Serbia and Montenegro, until Montenegro chose independence in 2006. In ICTY documents it is difficult to distinguish between the FRY and Serbia and Montenegro from the Republic of Serbia, given the political dominance of Serbia in each incarnation of the federation. [↑](#footnote-ref-59)
60. On 20 March 1993, Bosnia and Herzogovina filed a case with the ICJ against the Federal Republic of Yugoslavia for breaching the 1951 Convention on the Prevention and Punishment of the Crime of Genocide.In February 2007, Serbia was found not to be responsible for genocide, but was found to be in breach of the [Convention](http://en.wikipedia.org/wiki/Genocide_Convention) by failing to prevent the genocide from occurring and for not cooperating with the [ICTY](http://en.wikipedia.org/wiki/ICTY) in punishing the perpetrators of the genocide. Croatia and the Republic of Serbia alleged genocide convention breaches against each other at the ICJ that were both rejected by the court in February 2015. [↑](#footnote-ref-60)
61. See *Prosecutor v.* *Milošević* Trial Chamber Decision on the Motion for Judgment of Acquittal), ICTY Case No. IT-02-54-T, 16 June 2004, §138. [↑](#footnote-ref-61)
62. See Prosecution Response to the 6 May 2003 Submission by Serbia and Montenegro Regarding Outstanding Requests for Assistance, ICTY Case No. IT-02-54-T, 20 May 2003. Footnote 15 of the Motion refers to the 12 July 2002 document, Prosecution’s Application for an Order Pursuant to Rule 54 bis Directing the Federal Republic of Yugoslavia to Produce Documents. In this document, the Prosecution submitted that, on 28 June 2002, the OTP received an official response to its April 2001 RFA to the Federal Republic of Yugoslavia. In this response Dr. Nebojša Šarkić of the Federal Ministry of Justice informed the OTP that the Prosecution could not at that time inspect two documents regarding Slobodan Milošević’s arrest in Belgrade: the Decision on Arrest, dated 2 April 2001, and the Court Decision upon the Same Complaint, dated 3 April 2001, Minister Šarkić noted that inspection would be “possible upon termination of disputes of FR Yugoslavia with Bosnia and Herzegovina and Croatia before the International Court of Justice”. [↑](#footnote-ref-62)
63. See Tromp, note 6 above, p. 177; G. Nice and N. Tromp*, “*International Criminal Tribunals and Cooperation with States: Serbia and the Provision of Evidence for the Slobodan Milošević Trial at the ICTY”, in D. Amann and M. de Guzman (eds.)*, Arcs of Global Justice; Essays in Honor of William A. Schabas* (2017), p. 455. [↑](#footnote-ref-63)
64. J. Subotić, *Hijacked Justice* (2009). [↑](#footnote-ref-64)
65. See more on the importance of the ICJ proceedings: Nice and Tromp, note 60 above, pp. 445-465. [↑](#footnote-ref-65)
66. See the ICJ Judgment, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, at: http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [↑](#footnote-ref-66)
67. See for a full account of the significance of the SDC-documents: Nice and Tromp, note 60 above, pp. 451-452. [↑](#footnote-ref-67)
68. See the ICJ Judgement, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), 26 February 2007, at: http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [↑](#footnote-ref-68)
69. See the statement by Serb offiicials that the protection was meant to keep these documents from the ICJ, “IWPR was told by sources in Belgrade and The Hague that the special protective measures for the SDC documents were requested solely in order to ensure that they would not be cited as evidence at the ICJ”. Quoted in: H. Griffiths and A. Uzelac, “Justice at What Price?”, IWPR *Tribunal Update*, no. 407, 18 November 2005. [↑](#footnote-ref-69)
70. M. Bulatović, *Neizgovorena odbrana: ICTY vs. Slobodan Milošević (*2006). [↑](#footnote-ref-70)
71. E. Bećirević, “New Light Shed on Belgrade Role in Bosnian War,” IWPR, *Tribunal Update*, no. 526, 27 November 2007. [↑](#footnote-ref-71)
72. Decision on Prosecution Request for Change in Status of Certain Exhibits Admitted under Seal, *Prosecutor v. Perišić*, ICTY Case No. 04-81-T, 23 June 2011. Parts of the collection have been made available online by the Sense News Agency at: http://www.sense-agency.com/home/icty.59.html. Protections were lifted from transcripts of selected sessions relevant to the Perišić case, namely the 5th, 6th, 9th 12th,14th-22nd, 25th, 27th, 28th, 30th, 31st, 35th, 37th, 38th, 41st, 44th, 56th, and 58th. Protections were also lifted from the minutes of the following sessions: 9th, 12th, 14th-16th, 18th, 21st-25th, 27th, 31st-33rd, 35th, 37th, 39th, 41st, 44th, 45th, 56th, and 58th. [↑](#footnote-ref-72)
73. For example, see “ICTY Lifts Seal from Supreme Defence Council Document in Momčilo Perišić Case,” *Sense Tribunal*, 25 March 2011. [↑](#footnote-ref-73)
74. See for the political context of the failure to file for a revision at the ICJ before the deadline of 26 February 2007:

    <https://www.slobodnaevropa.org/a/revizija-bih--politicka-kriza-/28327543.html>; <https://www.slobodnaevropa.org/a/hodzic-revizija-posljedice/28328830.html> [↑](#footnote-ref-74)
75. Tromp, note 6 above, p. 23. Quote: “Extratrial material originating from the ICTY and OTP includes investigative and analytical documentation, such as reports by in- house investigators, researchers, and analysts, which were not used per se in court proceedings.Internal policy documents on topics such as indictment strategies or how toconduct the trial also fall under the designation of extratrial material. In other words, a considerable amount of this material was used for investigative and research purposes without becoming a part of the official trial record”. [↑](#footnote-ref-75)
76. Marrus, note 6 above, p. 228. [↑](#footnote-ref-76)
77. The terms “intentionalists” and “functionalists” were coined by Timothy Mason in his 1981 essay “Intention and Explanation: A Current Controversy about the Interpretation of National Socialism”, in G. Hirschfeld and L. Kettenacker (eds.), *The “Fuehrer State”: Myth and Reality – Studies on Structure and Politics of the Third Reich* (1981).Mason criticized authors who focused too much on Hitler in explaining the Holocaust, calling them intentionalist. He called the opposing school functionalists because they saw the Holocaust as consequence of the way the Nazi State functioned. Mason himself proposed, as an alternative, an investigation into a broader perspective of the period with a distinct focus on the economy. [↑](#footnote-ref-77)
78. See R. Teitel, *Transitional Justice* (2000), 74; M. Osiel, *Mass Atrocities, Collective Memory and the Law* (1997), p. 100; and D. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1996). [↑](#footnote-ref-78)
79. For discussion on this topic in English, see L. J. Cohen, *Serpent in the Bosom: The Rise and Fall of Slobodan Milošević* (2002); S. Đukić, *Milošević and Marković: A Lust for Power* (2001); D. Doder and L. Branson, *Milošević: Portrait of a Tyrant* (1999); A. LeBor, *Milošević: A Biography* (2002); L. Sell, *Slobodan Milošević and the* *Destruction of Yugoslavia* (2002); and V. Stevanović, *Milošević: People's Tyrant* (2002). Also see B. Jović, *Knjiga o Miloševiću* (2002); and I. Stambolić, *Put u bespuće* (1995). And see note 76 above. [↑](#footnote-ref-79)
80. For example, see S. Biserko, *Yugoslavia’s Implosion: The Fatal Attraction of Serb Nationalism* (2012)*;* L. Sell, *Slobodan Milošević and the Destruction of Yugoslavia* (2002); N. Cigar and P. Williams, *Indictment in The Hague: The Milošević Regime and Crimes of the Balkan Wars* (2002); Tromp, *Prosecuting Slobodan Milošević* (2016). [↑](#footnote-ref-80)
81. For example, see L. J. Cohen, *Broken Bonds*: *Yugoslavia's Disintegration And Balkan Politics in Transition* (1995), pp. 130 and 265. [↑](#footnote-ref-81)
82. See Cohen, ibid.; Cohen, note 77 above; A. Pavković, *The* *Fragmentation of Yugoslavia: Nationalism and War in the Balkans* (1997); S. L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (1995);and D. Jović, *Jugoslavija: država koja je odumrla* (2003). [↑](#footnote-ref-82)
83. Jović, ibid.,pp. 491-492;Woodward,ibid.*,* pp. 80 and 94*.* [↑](#footnote-ref-83)
84. For example, see S. Antonić*, Slobodan Milošević: još nije gotovo* (2014); B. Jović, *Od Gazimestana do Haga Vreme Slobodana Miloševića: vreme Slobodana Miloševića* (2009), p. 200.Jović emerged as an apologist in *Od Gazimestana do Haga*, especially in his evaluation of Milošević’s conduct at trial in The Hague, which Jović characterizes as a heroic defence of Serbia. [↑](#footnote-ref-84)
85. Antonić, ibid.*,* p. 478. Some former admirers have referred to Milošević as no more than a “smalltime banker”. See “Kusturica: Milošević je bio mali bankar, a ne Hitler”, *Kurir*, 19 August 2011, at: http://www.kurir-info.rs/kusturica-Milošević -je-bio-mali-bankar-a-ne-hitler-clanak-106097 (accessed 20 September 2014). Also see M. Jovanović, “Srećko Horvat: intervju”, *Pešćanik*, 13 January 2014, at: <http://pescanik.net/>srecko-horvat-intervju/ (accessed 25 September 2014). [↑](#footnote-ref-85)